No. 20,204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

DANILO A. MAYORGA,

Debtor.

Appeal From the Judgment of the United States District Court for the Northern District of California Southern Division

Honorable Alfonso J. Zirpoli, *Judge.*

BRIEF OF AMICUS CURIAE.

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TABLE OF AUTHORITIES CITED

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I.

Introduction.

The matter on appeal involves the question of whether or not a wage earner plan of extension under Chapter XIII of the Bankruptcy Act may be confirmed where the Debtor has, in a bankruptcy proceeding commenced within six years prior to the filing of the wage earner proceeding under Chapter XIII, received a discharge in bankruptcy.

A stipulation has been filed with the Court for this appearance of *amicus curiae* and an order was made granting time for the filing of this *amicus curiae* brief.

II.

Relevant Statutory Provisions.

The problem involved here is to construe the language of the statute so as to give effect to the intent of Congress. (*United States v. American Trucking Assns.* (1940), 310 U.S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345.) The relevant statutory provisions are as follows:

Bankruptcy Act Section 14(c)(5), (11 U.S.C. 32):

> "The court shall grant the discharge unless satisfied that the bankrupt has (5) in a proceeding under this Act commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act;"

Bankruptcy Act Section 602 (11 U.S.C. 1002):

> "the provisions of Chapters I to VII inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: Provided, however, That subsection f of section 70 shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of Chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original

petition under section 622 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 621 or 622 of this Act except where an adjudication had previously been entered."

Bankruptcy Act section 656(a)(3) (11 U.S.C. 1056 (a)(3)):

"The court shall confirm a plan if satisfied that (3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt;"

Bankruptcy Act Section 660 (11 U.S.C. 1060):

"Upon compliance by the debtor with the provisions of the plan and upon completion of all payments to be made thereunder, the court shall enter an order discharging the debtor from all his debts and liabilities provided for by the plan, but excluding such debts as are not dischargeable under section 17 of this Act held by creditors who have not accepted the plan."

Bankruptcy Act 661 (11 U.S.C. 1061):

"If at the expiration of three years after the confirmation of a plan the debtor has not completed his payments thereunder, the court may nevertheless, upon the application of the debtor and after hearing upon notice, if satisfied that the failure of the debtor to complete his payments was due to circumstances for which he could not be justly held accountable, enter an order discharging the debtor from all his debts and liabilities provided for by the plan, but excluding such debts as are not dischargeable under section 17 of this Act held by creditors who have not accepted the plan."

III.

The Relevant Case Authority.

Although the cases are hopelessly divided on the issue presently before this Court, the clearest lineup of cases on either side is presented by the Court of Appeals for the Sixth Circuit in *In re Perry* (CA 6th, 1965), 340 F. 2d 588. The cases listed as supporting *Perry* in concluding that confirmation of a wage earner extension may not be had where the Debtor received a discharge in a bankruptcy filed within six years prior to the filing of the Chapter XIII proceeding are:

In re Schlageter (CA 3, 1963), 319 F. 2d 821;

In re Jensen (CA 7, 1952), 200 F. 2d 58;

In re Fontan (S.D. Miss. 1964), 227 F. Supp. 973;

In re Nicholson (D.Ore. 1963), 244 F. Supp. 773;

In re Bingham (D.Kan. 1960), 190 F. Supp. 219.

Listed by *In re Perry* as supporting the proposition that confirmation can be had in such a case as this are the following decisions:

Edins v. Helzberg's Diamond Shops, Inc. (CA 10, 1963), 315 F. 2d 223;

Fishman v. Verlin (CA 2, 1958), 225 F. 2d 682;

In re Sharp (W.D.Mo. 1962), 205 F. Supp. 786;

In re Mahaley (S.D.Cal. 1960), 187 F. Supp. 229;

In re Verlin (E.D.N.Y. 1957), 148 F. Supp. 660.

To this listing should be added, in support of the Debtor's position, *In re Holmes* (CA 10, 1962), 309 F. 2d 748. It should also be noted that the matter of *In re Jensen* cited in support of the decision by the Court of Appeals in *In re Perry* involves Chapter XI proceedings, rather than Chapter XIII proceedings, and that in Chapter XI proceedings the order of confirmation itself constitutes a discharge, which is not the case in Chapter XIII. Compare Section 371 of the Bankruptcy Act (11 U.S.C. 771) with Section 660 of the Bankruptcy Act (11 U.S.C. 1060).

The Court of Appeals in *In re Perry* has not only chosen to disagree with the Tenth and Second Circuits, but it has also apparently overlooked its own prior decision in *In re Goldberg* (CCA 6h Cir. 1931), 53 F. 2d 454, in which the Court held that confirmation of a composition under the old Section 12, predecessor of our present Chapter XIII, does not bar a later confirmation of a composition under Section 12 within six years of the former. Section 12(d) (11 U.S.C. section 30(d)) as it existed contained a provision similar to that of Section 656 in providing "The judge shall confirm a composition if satisfied . . . (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; . . ." The Court of Appeals for the Sixth Circuit in *Goldberg* stated with reference to this provision at page 455:

> "It is not difficult to determine what 'acts' and 'duties were referred to in clause 2. They are those acts and duties found in clauses (1) and (2) of section 14(b) of the original act. . . . By its provision, a discharge is denied if the bankrupt has

committed any of the offenses or failed to perform any of the duties specified in its numbered clauses. . . . Section 12(d) (2) denies composition upon the same grounds; and that is, if the bankrupt has been guilty of any of the acts or failed to perform any of the duties specified in section 14(b) as it now stands, which would be a bar to his discharge. If appellant is denied confirmation of the composition he has made with his creditors, it can only be because he is guilty of the offense of applying for such an order within six years after he has been granted a discharge in bankruptcy.'

"If the argument is sound, it follows that appellant is denied composition because he is guilty of an offense not explicitly denounced, and having no firmer basis than judicial construction. We do not think such a result is justified by any legislative policy of which we are aware. The word 'guilty' used in clause (2) paragraph (d), section 12, denotes intentional wrongdoing. . . ."

Further, at page 457:

"Upon full consideration, we cannot say that until there shall be more explicit legislative pronouncement, that congress had intended to deny a bankrupt and his creditors the privilege of more than one beneficial good faith settlement within any six year period. The reason for such a denial is not apparent. It has been uniformly held that the bankrupt is entitled to a liberal construction of the Act in his favor. . . . There is nothing to indicate that congress ever considered such a settlement as a public evil or that it was ever confronted with the peculiar question. Judged by the reported decisions this is its first appearance in the courts."

It is unfortunate that the Sixth Circuit in *In re Perry* did not consider or dispose of its prior decision in *In re Goldberg.*

Professor Moore, one of the country's outstanding authorities on bankruptcy and insolvency proceedings, stated in Moore's Bankruptcy Manual (1939) at page 779:

> "It was pointed out in connection with section 656 (a) that the Act does not preclude the confirmation of a plan although the debtor has been granted a discharge or had an arrangement confirmed within six years. . . . Section 14(c)(5) precludes a court from granting a discharge to a bankrupt who 'has within six years prior to bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner plan by way of composition confirmed under this Act.' Is this section applicable to Chapter XIII proceedings? It is believed that the answer is in the negative. It should be noted that while sections 660 and 661 make section 17 (Debts Not Affected By a Discharge) expressly applicable to the extent stated therein, they do not refer to the companion section 14. (Discharges, when Granted Further, the policy underlying section 14(c)(5) *supra* of course does not seem applicable to Chapter XIII proceedings."

IV.

Argument.

The rationale of the cases followed by the District Court herein, the Court of Appeals for the Sixth Circuit and the Court of Appeals for the Third Circuit is that Section 656(a), 660 and 661 of the Bankruptcy Act "are in pari materia and must be construed together", and that when so construed, the "plain meaning" of the statute is clear and prevents confirmation.

The rationale of the Court of Appeals of the Tenth Circuit, the Second Circuit, and the Southern District of California is that, in addition to the foregoing sections, there is Section 602, which is *in pari materia* with Section 656(a), Sections 660 and 661, and Section 14(c)(5). This latter line of cases, utilizing, in part, Section 602, holds that, the language of the statute is not so clear as to prevent further judicial inquiry as to the legislative policy and intent. Further, they hold, that upon making such judicial investigation, the legislative intent appears to favor confirmation in the situation here presented. They hold that the provisions of Section 14(c)(5) are inconsistent with and do not apply to bar confirmation (as distinguished from discharge) of a plan of extension only under Chapter XIII. These cases talk in terms of ascertaining Congressional policy and intent to prevent repeated avoidance of debt rather than payment of debt under a plan of extension. These cases also talk in terms of the language "guilty of any of the acts" or "failure to perform any of the duties" as being inapplicable to a prior discharge in bankruptcy. These cases look to the Congressional record, the Committee Reports and the pur-

pose and policy behind Sections 14(c)(5), 656(3) and 602. Upon examination, this line of cases concludes implicitly that, had Congress considered the problem, its solution would have been to allow confirmation of a plan by way of extension, even though a discharge is received in a bankruptcy proceeding filed within six years prior to the wage earner proceeding.

Therefore, the question before this Court ultimately comes down to this: Is the language of the statute so clear as to require an automatic application of the "plain meaning" rule of legislative interpretation? As the Supreme Court stated in *Caminetti v. United States* (1917), 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442:

> "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."

If this Court finds such a plain, unambiguous meaning from the language of the statute, then the Court will follow the lead of the Sixth Circuit, and the Third Circuit, and deny confirmation herein.

If the Court feels that there is an element of doubt in the language, it will proceed further to determine the purpose and intent of Congress. The general principles and concepts to be followed by the Court in determining that intent will now be briefly considered.

In the case of *The River Wear Commissioners v. Adamson* (*House of Lords*), (1887) Law Reports, 2 Appeals Cases 743, reference was made to the earlier "Heydon's Case" wherein Lord Coke is quoted as follows:

> "that for the sure and true interpretation of all statutes in general (be they penal or beneficial,

> restrictive or enlarging of the Common Law) four things are to be discerned and considered: 1st. What was the Common Law before the Act? 2nd. What was the mischief and effect for which the Common Law did not provide? 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy."

It was further stated by Lord Blackburn, in the *Adamson* case that,

> "we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear."

We feel the correct principle to be applied in this case was stated clearly by Mr. Justice McKenna in his dissent in *Caminetti v. United States* (1917), 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442, when he stated:

> "Undoubtedly in the investigation of the meaning of a statute we resort first to its words, and when clear they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application or, at least, encounters other

> principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definitions; the subject-matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case."

It is based upon this principle that the *Maheley, Edins, Verlin* line of cases have resorted to the legislative history and purpose to show that what Congress intended was to prevent repeated avoidance of debts and that no purpose was shown to prevent repeated extensions to pay debts in full. On the contrary, the *Maheley* line of cases have demonstrated the Congressional intent to encourage rehabilitation proceedings as an alternative to bankruptcy. These cases recognize the difficulty of statutory construction. However, they apply, without explicitly so stating, the rule adopted by the Supreme Court of the United States in *Holy Trinity Church v. United States* (1892), 143 U.S. 452, 12 S. Ct. 511, 36 L. Ed. 226 that:

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often

> asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

In *United States v. Kirby,* 7 Wall. 482, 486, 19 L. Ed. 278, it is stated:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

Each of the cases following Maheley have sought legislative intent from legislative history, legislative policy, the evils sought to be eradicated, etc., and have concluded that it was not the intent of Congress to prevent confirmation of an extension plan because of a discharge received in a prior bankruptcy proceeding brought within six years.

V.

Conclusion.

The existence of a split of authorities between the Second and Tenth Circuits on the one hand and the Third and Sixth on the other, confirms that the language of the statute is not free from ambiguity. If this Court finds ambiguity and doubt, then the policy sought to be achieved by Congress and the probable intent of Congress is what must be ascertained to resolve the instant case. On such an approach, the decision of the lower court herein must be reversed and confirmation of the plan of extension allowed. That legislative changes are pending to clarify the ambiguity in the statute and to make clear that a discharge in bankruptcy should not bar confirmation of an extension plan would seem to reinforce this conclusion.

Dated, Los Angeles, California.

September 28, 1965.

SULMEYER AND KUPETZ,
By IRVING SULMEYER,
Amicus Curiae.

Certificate.

I certify that, in connection with the preparation of this brief. I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

IRVING SULMEYER.